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In the Supreme Court of the United States

OCTOBER TERM, 1987

ONE 1984 LINCOLN MARK VII TWO-DOOR, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Ex Post Facto Clause or the general rule against retroactive application of newly enacted statutes bars the civil forfeiture of property that was acquired through illegal narcotics activity prior to the enactment of 21 U.S.C. 881(a)(6).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 78a-108a) is reported at 829 F.2d 532. The opinion of the district court (Pet. App. 1a-77a) is reported at 630 F. Supp. 1540.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1987. The petition for a writ of certiorari was filed on December 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On March 13, 1984, the United States filed a complaint in the United States District Court for the Eastern District of Texas seeking forfeiture, pursuant to 21 U.S.C.

881(a)(6), of D.K.G. Appaloosas, Inc., a Texas corporation, and all of its assets as the proceeds of illegal narcotics activity. Over the next few months, the United States filed similar complaints under 21 U.S.C. 881(a)(6) with respect to certain real and personal property, horses, and money. The complaints were consolidated, and claimants Bruce Emery Griffin, Donna Kraus Griffin, NABUC, Ltd., and D.K.G. Appaloosas, Inc., filed claims against the seized property. After two jury trials on questions relating to the forfeiture, the district court ordered that certain cars, gold bars, and jewelry be forfeited to the United States (Pet. App. 1a-77a). The court of appeals affirmed (*id.* at 78a-108a).

1. Bruce Emery Griffin was a major importer of marijuana and cocaine into this country during the 1970s. He earned approximately $85-$100 million in connection with his drug activities. In 1982, a federal grand jury in the Southern District of Florida indicted him and charged him with conducting a continuing criminal enterprise over the preceding six years, as well as other offenses. The charges were resolved by a guilty plea. Under the plea agreement, Griffin agreed to testify against his co-defendants and to cooperate with the government's investigation of illegal drug activities; in return, the government agreed, among other things, not to seek further civil or criminal sanctions against Griffin for conduct known to the government at the time he entered into the plea agreement in September 1983. Pet. App. 3a-5a, 80a-81a.

In March 1984, the government filed a civil forfeiture complaint, pursuant to 21 U.S.C. 881(a)(6), in the United States District Court for Eastern District of Texas, seeking forfeiture of certain real and personal property, including a herd of horses and money in two bank accounts, on the ground that the property constituted the proceeds of illicit drug activities (Pet. App. 81a). Griffin and others

filed claims against the seized property; they eventually conceded that there was probable cause to believe that the seized property was acquired with illegal drug proceeds, but they asserted that Griffin's plea agreement barred the forfeiture in the Eastern District of Texas in its entirety (*id.* at 82a-83a). At the same time, Griffin moved in the Southern District of Florida for specific performance of his plea agreement (*id.* at 82a). The forfeiture proceedings in the Eastern District of Texas were held in abeyance pending a decision from the court in the Southern District of Florida (*id.* at 83a). On August 16, 1985, the court in the Southern District of Florida provisionally granted Griffin's motion for specific performance, finding that the plea agreement barred forfeiture of the D.K.G. Ranch and certain other items of seized property because it constituted a sanction against Griffin for conduct known to the government at the time the plea agreement was signed (*id.* at 83a-84a).

2. In accordance with the provisional ruling, the court in the Eastern District of Texas ordered that any property owned by Griffin at the time the agreement was entered into be protected from civil forfeiture (Pet. App. 84a). It then held two jury trials. The first trial addressed the question whether Griffin was the true owner of certain of the forfeitable property, including the ranch and the buildings, motor vehicles, and horses located on the ranch. The second trial addressed the question whether the government knew at the time of the plea agreement that Griffin owned other items of forfeitable property, including the cars, gold, and jewelry (*id.* at 84a-85a). The first jury found that Griffin owned the property; accordingly, the district court ordered that the property be returned to the claimants, on the theory that the plea agreement barred the forfeiture. The second jury found that the government did not know about the other items of forfeitable property when it entered into the plea agree-

ment; accordingly, the court held that the agreement did not bar the forfeiture of those items and ordered them forfeited (*ibid.*).

3. The court of appeals affirmed (Pet. App. 78a-108a). Among other things, it rejected Griffin's argument that 21 U.S.C. 881(a)(6) could not authorize the forfeiture of narcotics proceeds received before 1978, when that subsection of the forfeiture statute first became effective (Pet. App. 94a-105a). Because Griffin had not argued in the district court that the general rule against retroactive application of statutes made 21 U.S.C. 881(a)(6) inapplicable to this case, the court of appeals declined to address the argument on appeal (Pet. App. 94a-95a n.6). In addition, the court concluded that 21 U.S.C. 881(a)(6) is not subject to the Ex Post Facto Clause (Pet. App. 95a-105a).

With respect to the latter point, the court noted (Pet. App. 95a) that "the *ex post facto* clause applies only to criminal cases." The court added that, of course, "the *ex post facto* effect of a law cannot be evaded by simply giving a civil form to that which is essentially criminal" (*ibid.*), and that "forfeiture statutes like section 881 have been considered criminal for certain purposes" (*ibid.* (citations omitted)). But it further noted that, "for other purposes, the civil nature of forfeiture proceedings has been held to bar the application of important constitutional protections" (*id.* at 95a-96a) and that, "[b]ecause determining when a forfeiture proceeding is civil or 'essentially criminal' is not always readily apparent, the Supreme Court has developed a specific analysis for making the distinction" (*id.* at 96a (footnote omitted)). Specifically, the court of appeals stated that, under this Court's decisions, a sanction must be intended as "punishment" in order for it to be treated as "essentially criminal" (*id.* at 97a-98a) and that the label given to a sanction is dispositive unless, where a civil label has been given, " 'the statutory scheme

[is] so punitive either in purpose or effect as to negate that intention' " (*id.* at 98a, quoting *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362-363 (1984)).

As to the first prong of this analysis, the court of appeals concluded that "Congress designed [21 U.S.C. 881(a)(6)] to be a remedial civil sanction" (Pet. App. 101a). The court noted that "the language Congress chose for section 881 evidences its intent to provide for a civil forfeiture proceeding" (*ibid.*, citing 21 U.S.C. (& Supp. IV) 881(b)(4), 881(i)). The court further noted that "Congress incorporated by reference the procedures of forfeiture under an already existing body of civil forfeiture law—in this case, customs law," and that, " '[b]y creating such distinctly civil procedures for forfeitures * * * Congress has "indicate[d] clearly that it intended a civil, not a criminal, sanction" ' " (Pet. App. 101a (quoting *United States* v. *One Assortment of 89 Firearms*, 465 U.S. at 363)). Finally, the court noted that a separate statutory provision, 21 U.S.C. (Supp. IV) 853, contains an express criminal forfeiture sanction. The court observed that "the fact that the statute under consideration 'contains two separate and distinct provisions imposing sanctions and that these appear in different parts of the statute[] helps to make clear the character of that here invoked.' " In addition, the court concluded that "the legislative history of section 853 clears up any remaining doubt that section 881 was intended to provide a civil sanction" (Pet. App. 102a (citation omitted)).

The court then found that "the purpose or effect of the forfeiture [provision] is [not] so punitive that it requires us to override Congress' preference for a civil sanction" (Pet. App. 103a). It stated that the "legislative history to section 853 makes it clear * * * that the forfeiture provisions of Title 21 have a strong, remedial aim," to wit, to

attack the economic aspects of illegal drug trafficking (*id.* at 104a). And the court added that "refusing to apply the [*ex post facto*] clause would not directly protect individuals, as opposed to property, from punishment" (*id.* at 105a).

ARGUMENT

1. Petitioners argue (Pet. 6-8) that the Ex Post Facto Clause of the Constitution bars the application of 21 U.S.C. 881(a)(6) in this forfeiture action. As noted by the court below (Pet. App. 95a), however, the ex post facto prohibition relates only to penal legislation imposing or increasing a criminal punishment. See *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981); *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). Thus, where a statute has a non-punitive, remedial goal, ex post facto considerations do not apply. See, *e.g.*, *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955) (deportation proceedings that are instituted as a result of the deportee's commission of an offense are not deemed punitive for purposes of the Ex Post Facto Clause); *United States* v. *Kairys*, 782 F.2d 1374, 1382-1383 (7th Cir.), cert. denied, 476 U.S. 1153 (1986) (denaturalization proceedings do not inflict punishment, even though removal of citizenship works a "penalty" for misconduct upon entry). Moreover, as the court below also recognized (Pet. App. 97a), a sanction is not deemed punitive unless Congress has expressly or implicitly so labeled it, or unless the statutory scheme is so punitive in either its purpose or effect as to negate the intention otherwise inferable from the statutory label. See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362-363 (1984); *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980); *Helvering* v. *Mitchell*, 303 U.S. 391, 398-399 (1938). The civil forfeiture provisions of 21 U.S.C. 881(a)(6) do not satisfy either of those conditions.

Civil forfeiture has historically been regarded as a remedial and not a penal sanction. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-687 (1974); *United States* v. *$364,960.00 in United States Currency*, 661 F.2d 319, 323 (5th Cir. 1981); *United States* v. *$5,644,540.00 in United States Currency*, 799 F.2d 1357, 1364 n.8 (9th Cir. 1986). While the civil forfeiture provisions of 21 U.S.C. 881(a)(6) are akin to criminal proceedings, they have a substantial, non-punitive, remedial goal—*i.e.*, the raising of revenue and the destruction of the financial basis of drug trafficking organizations. As the Second Circuit has explained (*United States* v. *$2,500 in United States Currency*, 689 F.2d 10, 13-14 (1982), cert. denied, 465 U.S. 1099 (1984)), the statute is designed to promote the broad remedial purpose of "impeding the success of the criminal enterprise by eliminating its resources and instrumentalities, diminishing the efficiency and profitability of the business by increasing the costs and risks associated with it, and helping to finance the government's efforts to combat drug trafficking." Moreover, civil forfeiture proceedings are not so punitive as to render these remedial purposes insufficient; as the Second Circuit has also noted (689 F.2d at 14), a prior judgment of civil forfeiture carries none of the stigma otherwise associated with "convictions"—job applicants, for example, "rarely, if ever," are asked to disclose prior judgments of forfeiture against them.

Petitioners attempt (Pet. 8) to draw support from two recent decisions of this Court, but that effort is unavailing. Neither of the cases on which they rely holds or even implies that the ex post facto prohibition applies in civil forfeiture proceedings. In *Weaver* v. *Graham, supra,* the Court held that the Ex Post Facto Clause barred the retroactive application of a statute that altered a convicted defendant's parole expectations; there is, however, an obvious distinction between amending a criminal penalty

after a criminal conviction and providing new civil remedies and revenue-raising provisions after a criminal act has occurred. In *United States* v. *Ward, supra,* the Court declined to require the government to provide constitutional protections ordinarily associated with criminal proceedings, including the Fifth Amendment protection against compulsory self-incrimination, in connection with a civil penalty; therefore, if anything, *Ward* makes clear that offending conduct may be subject to both criminal and civil sanctions and that the protections available in criminal cases do not necessarily apply in parallel civil cases.

2. Petitioners similarly err in suggesting (Pet. 8-9) that "rules of statutory construction prevent retroactive application of [Section] 881." To begin with, the court of appeals refused to address that question because petitioners did not raise it prior to trial in the district court; the issue is therefore not properly presented to this Court. In any event, the presumption that legislation is prospective only does not apply where a new statute is either procedural or remedial (see *United States* v. *Vanella,* 619 F.2d 384, 385-386 (5th Cir. 1980)), which 21 U.S.C. 881(a)(6) clearly is. Prior to the enactment of 21 U.S.C. 881(a)(6), Congress had provided for the criminal forfeiture of illegal proceeds earned by certain drug offenders. See 21 U.S.C. (1970 ed.) 848, recodified at 21 U.S.C. (Supp. IV) 853. The civil forfeiture provisions in 21 U.S.C. 881(a)(6) merely altered the procedures to which the government may resort in seeking forfeiture of such proceeds; the new statute did not suddenly and retroactively declare contraband the property that a person was previously legally entitled to hold. Accordingly, in light of the pre-existing criminal forfeiture provision, it is clear that 21 U.S.C. 881(a)(6) does not impair any legitimate expectations and

may be applied retroactively to the proceeds of illicit drug activity engaged in prior to the statute's enactment.

3. Finally, petitioners err in suggesting (Pet. 9-10) that the Department of Justice has "conceded" that 21 U.S.C. 881(a)(6) may not be applied retroactively. The Department of Justice's *Drug Agents' Guide to Forfeiture of Assets* (1981) merely speculates that courts may not be willing to apply 21 U.S.C. 881(a)(6) retroactively and advises government officials to take a conservative approach in prosecuting forfeiture cases. The *Guide* is not, and was not intended to be, a "concession" on the question of the retroactivity of 21 U.S.C. (& Supp. IV) 881.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* In any event, the *Guide* does not purport to set forth an official government position, and it is not legally binding on the Department of Justice. And even if the *Guide* reflected a deliberately chosen interpretation, that would not estop the government from asserting a different position in this case. See *Barrett* v. *United States*, 423 U.S. 212, 222 n.6 (1976).

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